IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 79

ROBERT L. PIERSON, *et al.*,

Petitioners,

—v.—

J. L. RAY, *et al.*,

Respondents.

No. 94

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—v.—

ROBERT L. PIERSON, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS IN CAUSE NO. 79 AND RESPONDENTS IN CAUSE NO. 94

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I.

Respondents do not rebut the conclusion that Congress modified the common law immunity of the judiciary to suits for damages.

Respondents never deal with the real question before this Court—what did the 1871 Congress do? References to Black Power, or Watts, or Martin Luther King, or Communist infiltration do not help at all. Perhaps those words —and all the emotions that lie behind them—would be relevant to what a 1966 Congress would be likely to do when faced with choices between the individual and the official. But the issue before this Court is the meaning of the 1871 Congress. And that Congress (as is shown in the portions of our brief which respondents never meet) intentionally and knowingly gave harsh remedies against state officials.

What did that Congress do about the common law immunity of judges? It overrode it for state judges, knowingly and over the explicit objections of opponents.

In many cases of statutory interpretation, analysis of the debate merely indicates a few opinions as to meaning of ambiguous language. "The rest is silence." And so the Court is not helped much by such debate. But in the matter before this Court today, no speculation is required. The language is clear. Judges' liability is covered explicitly in the debate (as it had been in 1866). Everyone, opponents and proponents, said that judges would be liable. No doubt can seriously exist as to this fact. Whatever the merits may be for judicial immunity in other cases, it would be rewriting this law to find such immunity here.

We add that in our view this means liability for judges for knowingly or willfully depriving one of equal rights.

No argument is made, nor can it be made, that Congress has not the power to hold judges liable for knowing wrongs. No deep incursion into civil war history is needed to explain the mind of the earlier Congress. In just such cases as are before us today, certain local judges played their roles, together with the police, in denying equal rights. Whatever the facts, the police arrest and the judges convict. This is the wrong Congress intended to correct. We urge that that is the case before us and is encompassed within the intent of Congress.

Contrary to what respondents contend (brief p. 37), Police Justice Spencer does have to rely upon an absolute immunity from being sued for knowingly and willfully depriving persons of their constitutional rights. Petitioners' proof with respect to Judge Spencer was cut off by the trial court. The jury verdict was, of course, tainted by the admission of improper evidence. The decision of the Fifth Circuit was in effect, and by express statement, a ruling that the police Justice was immune without regard to the allegations against him or what the proof might show.

II.

Did petitioners consent to the arrest?

Consent to an illegal arrest is absurd on its face. An arrest is an intentional act by police officers. It is no more a consensual act to be arrested than it is consensual to be electrocuted at a later time in the arrest process.

While it is certainly true that petitioners knew that they might be arrested no matter how peaceful they were, because of the way the police were acting in Jackson, the option was entirely that of the police. Petitioners had a

right to be there in a peaceful manner. Being peaceful, they were nevertheless arrested. At this point, a brave man must face his responsibility. To have left this station after this clearly improper order of the police, when one is doing no wrong, would have been an act of cowardice. In every way, it would have continued to perpetuate the immoral practice of segregation. If people walk away at this, the immoral practice goes on. But knowing that the police will probably act improperly does not make the refusal to move an act of consent. One may consent to a variety of acts, such as batteries, but that was not the case here. Knowledge that they would be arrested should they refuse the illegal order of the police is hardly the consent that vitiates the wrong of the police, knowingly acting in response to the police stanchion, "White only, by order of the police."

The "plan and purpose" defense suggested by the Fifth Circuit could not come into play until petitioners were arrested and the arrests are found to have been illegal. Consequently, most of what respondents say on that issue is beside the point. If the arrests were illegal, and if, as is conceded, the ministers did nothing to initiate the arrests other than to enter the terminal as an integrated group, then surely those who made the illegal arrest should not be free from liability because the persons arrested knew that they might be or even probably would be arrested. No less is this true even though they thought that an arrest might hasten the end of evil by exposing it. The arrests were just as illegal whether the ministers deplored their arrests as symptomatic of sham justice in support of segregation or thought their arrests would be a useful witness which would focus attention on sham justice in support of segregation.

III.

Respondents improperly interpret the claim of petitioners as being based solely on the later declaration of unconstitutionality in *Thomas* v. *Mississippi*.

Respondents and the Court below (R. 448-449) misinterpret the claim of petitioners. We rely only in part on the fact that in *Thomas* v. *Mississippi*, 380 U. S. 564 (1965), this Court reversed the convictions of the freedom riders, without oral argument, on the theory that the statute of Mississippi, as interpreted by their Courts, was unconstitutional. But we urge that equally significant, and ignored by the Court below, is the fact that at the trial *de novo* of Father Jones, the case was dismissed by Judge Moore at the end of the prosecution's case. In other words, there was no evidence which showed a violation of law, and therefore no basis for the arrests.

In this sense, the case before us now is different from *Thomas* v. *Mississippi, supra*. In *Thomas* the convictions by Judge Spencer were upheld by Judge Moore in the trial *de novo* as well as in the higher appeals in Mississippi. But not so in the case before us. There was no evidence for the arrest in the first place in our case. We do not rely solely as the Court below thought, then, on the statute being declared later unconstitutional. We urge that these defendants individually and in concert arrested and convicted petitioners and thus knowingly deprived them of equal rights guaranteed by the United States Constitution and particularly section 1983.

The evidence in this case, together with what we were allowed to show, upholds our contention that they were

arrested solely for the purpose of protecting segregation in Mississippi. In front of the door to the bus station was the sign "White Only by Order of the Police". In other words, if Negro and white clergymen entered together they were in violation of the police order. This explains the action of the police immediately after the clergymen entered the station. This accounts for the arrest. Nothing in the conduct of the clergymen can account for it. Furthermore, this Court's decision in *Thomas* v. *Mississippi*, 380 U. S. 524 (1965), reversing at the time it granted certiorari, holds that peaceful persons, who have done nothing to incite others to violence, contrast *Feiner* v. *New York*, 340 U. S. 315 (1951), cannot be arrested because others indicate that they so dislike them that they might act violently against them. That was the issue in *Abernathy* v. *Alabama*, 380 U. S. 447 (1965), one of the two cases cited by this Court in *Thomas* (see *Abernathy* v. *Alabama*, 155 So. 2d (Ala. Ct. Appeals 1962)).* The purported basis for the arrests, therefore, has been held insufficient by this Court. When that is the case, the state official is liable for his actions even though, as with the "Judges of Elections" involved in *Nixon* v. *Herndon*, 273 U. S. 536, 539 (1927), the action was taken on the basis of a state statute, even if, as in *Smith* v. *Allwright*, 321 U. S. 649 (1944), the state statute had earlier been upheld by this Court.

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* Similarly in *Cox* v. *Louisiana*, 379 U. S. 536 (1965), this Court held not only that the Louisiana statute—this statute *in haec verba*—was unconstitutionally vague, but also that the state could not arrest and punish unpopular but non-violent persons merely because "violence was about to erupt" from others.

IV.

Probable cause for the arrests herein has improperly been admitted as a defense to plaintiffs' causes of action.

As *Prosser On Torts* points out, Section 12 (3rd edition), much confusion exists as to the difference between false arrest and malicious prosecution. Malicious prosecution derives from the common law action founded in case. It is an action directed not against the police officer carrying out the mandate of a Court to arrest a particular person, but against the person making the charge to the police. Probable cause is available to such a person when sued for damages.

But to the officer making an arrest without a warrant of a court, for an act allegedly committed in his presence, no defense of probable cause is available in a suit for damages. This is an action for false arrest and stems from the Common Law action of trespass.

The confusion discussed by Prosser is illustrated both by the Court below (R. 452) and our worthy opponents in their brief at page 23.

Our opponents cite, as they acknowledge, malicious prosecution cases to prove the availability of probable cause as a defense. But this is precisely the difference between false arrest (trespass) and malicious prosecution (case). The cases they cite are not false arrest actions, and so are irrelevant.

Before this Court is an action for false arrest. While the Mississippi Courts illustrate the general confusion as to these causes of action, analysis shows that the Mississippi cases where probable cause was allowed as a defense, the

complaint alleged a malicious prosecution whatever the term actually used. Nothing in *Forsythe* v. *Ivey* is to the contrary (cited by our opponents on pages 21-2 of their brief). In that case nowhere does the Court state that probable cause is available as a defense in an action for false arrest.

Probable cause is not applicable to arrests made, as in the case at bar, where the action is against arresting officers and where the arrested persons committed no wrongful acts (as found by the trial *de novo*). Nor, at least under section 1983, is it a defense to arrests purportedly justified by a statute which is in fact unconstitutional.

The Court of Appeals (R. 452), conceived of Petitioner's action as being based solely upon a statute later declared unconstitutional (see *Thomas* v. *Mississippi, supra*). But, of course, this has never been so, thus the citation of *Golden* v. *Thompson,* 194 Miss. 241, 11 So. 2d 206 in their opinion is also quite irrelevant to the question of arrests made without evidence, since it does not discuss probable cause as a defense in a case of this kind.

V.

Respondents' factual statements.

1. Page 7: Petitioners had not at any time "congregated there standing in a group so as to block the stairs." Only subsequently to their being halted and then arrested did they stop inside the station. And accordingly any crowd that collected, if there was such, resulted from the police stopping and arresting them, and not from anything they had done.

2. Page 7: The reciting of the Lord's Prayer did not take place until after they were arrested, and thus could not be the cause of any crowd collecting before they were arrested.

3. Page 7: Respondents in effect concede at the outset everything they deny thereafter for they agree that police officers Griffith and Nichols prevented the ministers from entering the restaurant. It was afterwards, when the ministers had been brought back into the waiting room, that those officers arrested the ministers without seeking in any way to calm or restrain the "mumbling" onlookers.

VI.

CONCLUSION

For these reasons, as well as those set forth in our main brief, we request that the relief be granted as set forth in our main brief.

Respectfully submitted,

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